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No. 80-802

In the Supreme Court of the United States

October Term, 1980

NATIONAL GERIMEDICAL HOSPITAL AND GERONTOLOGY CENTER,
Petitioner,

vs.

BLUE CROSS OF KANSAS CITY AND BLUE CROSS ASSOCIATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT BLUE CROSS OF KANSAS CITY IN REPLY TO BRIEF OF AMICUS CURIAE

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The Brief for the United States as Amicus Curiae does not advance any valid grounds for review of the decision below. Amicus makes only two arguments: that the decision below "leaves both the health service industry and federal antitrust enforcement officials in need of this Court's guidance," and that the Court of Appeals' decision conflicts with implied antitrust exemption standards established by this Court. The latter argument is the same as the one made in Part II of the Petition which was fully discussed in Part III of the Brief of Respondent Blue Cross of Kansas City in Opposition to the Petition. For the reasons stated in respondent's Brief in Opposition, the Court of Appeals' decision properly applies all settled prin-

ciples of implied repeal and is *not* inconsistent with prior decisions of this Court.

Amicus' first argument suffers from the same error made by petitioner. Amicus begins with the proposition that the Eighth Circuit's decision "endorses" a "blanket immunity" from the antitrust laws (Amicus Brief at 5), and then reasons that in so doing the decision below "stands in conflict with the Department's [of Justice] conclusion in these business review letters." (Amicus Brief at 7). This reasoning totally ignores the very limited scope of the Eighth Circuit's ruling. The *holding* of the Eighth Circuit permits an implied repeal only as to the *particular conduct* involved in this case under the specific circumstances in which it occurred. (See Part I of Respondent's Brief in Opposition).

It is interesting that Amicus appends to its Brief the three Department of Justice releases and business review letters dealing with proposals under the Health Planning Act. Those releases and letters actually demonstrate, very clearly, that the decision below *is in fact fully consistent with* the Department's enforcement position. Those releases and letters reflect the Department's position that its enforcement intentions must necessarily depend upon an evaluation of the specific conduct in question under the particular circumstances in which it occurred. In the letter of May 6, 1980 from Sanford M. Litvack to William G. Kopit, the Department's approach was summarized as follows:

> "Thus, we would formulate enforcement intentions with respect to specific implementation activities only upon assessment in detail of the conduct in question, the specific circumstances in which it occurs, its relationship to the goals established for health planning by Congress and to the specific objectives of relevant

> plans, whether the conduct is necessary to achieve those goals and objectives, the degree to which competition would properly allocate resources if given the opportunity, and the availability of less anti-competitive alternatives." (Amicus Brief at 8a).

Moreover, the August 29, 1980 release presented the specific factual situation of "agreements between competitors" (Amicus Brief at 13a), and the June 13, 1978 release similarly presented specific facts involving "joint action by competitors" (Amicus Brief at 22a), neither of which involves the unique factual context in which the opinion below was decided.

Thus it is quite clear that the Court of Appeals' decision in this case, which was expressly limited to the very unique facts presented, is fully consistent with the position of the Department of Justice reflected in these releases and review letters to the effect that its enforcement intentions require independent evaluation of each specific set of facts presented. The decision below does not affect, must less impair, the Department's ability to provide guidance on its enforcement intentions, and in fact is fully consistent with the Department's conclusions stated in the releases and review letters appended to Amicus' Brief.

Although respondent's Brief in Opposition to the Petition fully disposes of Amicus' second argument that the decision below conflicts with prior decisions of this Court, respondent feels compelled to correct a glaring error in Amicus' discussion of that point. Amicus reasons that scrutiny of respondents' conduct under the antitrust laws cannot give rise to the required repugnance because "there is not even a finding that Blue Cross' actions were taken to assist MAHSA in implementing its HSP. . ." (Amicus Brief at 12). This is plainly wrong, for both the District Court and the Court of Appeals specifically relied on the

fact that the challenged conduct here—requiring petitioner to obtain need approval before constructing a new hospital —actually *did* assist MAHSA in implementing its Health Systems Plan. (Petition App. A at 9a-11a; Petition App. B at 30a-33a).

Independently, the Secretary of the Department of Health and Human Services reached the same conclusions as did counsel of record for Respondent Blue Cross of Kansas City. This is illustrated by the December 17, 1980 letter from Secretary Patricia Roberts Harris of the Department of Health and Human Services to Attorney General Benjamin R. Civiletti.[1] Because of its thoughtful analysis of the respective positions and the clearly expressed opinion of that department of the executive branch of the government directly responsible for implementing the acts of Congress concerning the delivery of health services, the Secretary's letter of December 17, 1980 is reproduced in full text as follows:

December 17, 1980

The Honorable Benjamin R. Civiletti
Attorney General
Washington, D.C. 20530

Dear Mr. Attorney General:

I am writing to express my dissatisfaction with the position the Solicitor General has authorized to be taken by

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1. Late Wednesday afternoon, December 17, 1980, counsel for Respondent Blue Cross of Kansas City was called by newspaper media of Washington and informed of the letter from Secretary Harris to Attorney General Civiletti. Counsel independently obtained a copy of the letter. Then as a matter of courtesy, counsel of record for Respondent Blue Cross of Kansas City inquired and was informed by the Secretary's General Counsel that the Secretary would not object to the reproduction of the text of the letter in this Brief since the letter was already a matter in the public domain.

the United States on the Petition for a Writ of Certiorari filed with the Supreme Court in *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City and Blue Cross Association* (Petition No. 80-802). The case was brought by the hospital to challenge Blue Cross's policy of refusing to enter into a participating hospital reimbursement agreement unless the hospital obtained a finding of need from the local health systems agency ("HSA"), consistent with the provisions of the National Health Planning and Resources Development Act of 1974 ("Act") as amended, 42 USC 300k, *et seq.* Rather than seek such a finding, the hospital filed suit claiming that Blue Cross's refusal to enter into a participating hospital reimbursement agreement constitutes an antitrust violation. Both the District Court and the Eighth Circuit held that the Act provides an implied exemption from the antitrust laws for Blue Cross's conduct and, accordingly, dismissed the complaint. This is consistent with this Department's legal interpretation of the Act and our policy for implementation of the Act.

Nonetheless, the Solicitor General has authorized the filing of an *amicus* brief supporting the hospital's position on certiorari, urging the Supreme Court to reverse the Eighth Circuit. I am very troubled by the Government taking this position, which I believe will impede implementation of the health planning process established by the Congress. In addition, I am particularly disturbed at the way in which the decision was made. In my view, this Department has been denied a fair opportunity to present its position on this matter, which is of great interest to us.

I would like to describe to you some of the background so that you will understand the strength of my feelings. For some time we have recognized the conflict between

the policy of the antitrust laws to promote competition and the policy underlying the health planning process, to coordinate health services and to eliminate unnecessary duplication. Congress established this process in recognition that competition has not worked in many areas of health care, and health planning is an important component of the Government's initiative to reduce the costs of the nation's health care system and to make that system more responsive to the needs of the people it serves.

Joan Z. Bernstein, General Counsel of this Department, and her staff have been discussing this matter with Sanford Litvack, Assistant Attorney General for the Antitrust Division, and his staff for many months. As the agency with responsibility to implement the health planning process, we initiated these discussions because we felt it necessary for the Government to provide the public with guidance on the application of the antitrust laws to the health planning process, and we sought to provide this guidance in consultation with the Antitrust Division. I think we have been quite reasonable and flexible in our efforts to develop a coherent Government position that would resolve the conflict between us in a way that would preserve the essential aims of both the antitrust and health planning laws, but to no avail.

Although we had been assured during our months of discussions with the Antitrust Division that they would consult with us before issuing any business review letters bearing on health planning, on May 6, 1980, they issued the Central Virginia Health Systems Agency business review letter without any consultation with us. The letter addressed four types of activity undertaken by HSAs: certificate of need reviews, proposed use of Federal funds reviews, appropriateness reviews, and activities to implement a health systems plan. We were gratified that the Antitrust Division stated that it does not intend to bring

enforcement action regarding the first three activities. However, the refusal to state enforcement intentions regarding plan implementation activities, perhaps the key to the whole process, was confusing, particularly because the Act expressly requires HSAs to undertake all four activities.

This letter made us increasingly concerned that the health planning process was being impaired unnecessarily by uncertainty over the application of the antitrust laws. We renewed our efforts to provide the health planning community with guidance as to the activities they could undertake to implement a health systems plan without fear of antitrust enforcement from the Department of Justice. We submitted to the Antitrust Division for their review and antitrust analysis, four hypothetical statements of conduct we regard as essential to plan implementation and not problematic from an antitrust perspective. Once again, they refused to respond or to offer more specific guidance.

During an October 10 meeting, Ms. Bernstein's staff discussed *National Gerimedical* with Antitrust Division staff. At that time, and during subsequent telephone discussion, Antitrust Division staff assured us that they would advise us if they were going to recommend to the Solicitor General that the Government participate in the case. Nonetheless, we only heard about the Antitrust Division recommendation from the Solicitor General's Office on December 10. At the time we were told that the Solicitor General would decide within two days whether to file the draft *amicus* brief prepared by the Antitrust Division.

In my view, this is an unacceptable way to develop policy, especially on such a complex and important issue. This Department and the Antitrust Division have a funda-

mental difference of opinion that has remained unresolved for some time, principally because of the Antitrust Division's adherence to their absolutist position that the Act does not exempt from antitrust scrutiny any activities to implement a health systems plan. Yet, the Solicitor General has authorized the Government to advocate the Antitrust Division position before the Supreme Court. The Department of Health and Human Services does not subscribe to this position and allowing it to be presented to the Supreme Court as the position of the United States unfairly suggests that the Government has adopted the position based on a proper decisionmaking process.

I oppose the Government filing an *amicus* brief seeking reversal of the Eighth Circuit's opinion in this case for the following reasons:

1. I believe that it is inappropriate for the Government to take a position before the Supreme Court until the position is that the health planning legislation effects a repeal of the antitrust laws, *inter alia*, for activities to implement a health systems plan and, as a matter of policy, we encourage the conduct challenged in this case.

2. The conduct at issue in this case does not give rise to any serious antitrust concern, as the Antitrust Division readily agrees. This is merely a case in which a private party conditions a benefit on a decision made by a Federally funded HSA, pursuant to a statutorily required public process, based on statutory criteria.

3. The facts of this case are unusual and not likely to recur. Almost all States now have "certificate-of-need" legislation which requires construction of health care facilities to be reviewed by an HSA. Thus, if Supreme Court guidance is desired, we

should wait for a case presenting facts more relevant to the health planning process as it now exists.

4. Finally, there is no conflict among the Circuits.

In light of these considerations, I hope the Justice Department will reverse its position and not file this brief. In any event, I hope you will appreciate my frustration and understand my obligation as Secretary to implement the health planning process and to provide guidance to the planning community, whether or not the Antitrust Division cooperates.

Sincerely yours,

Patricia Roberts Harris

It is significant that parties responsible for working in the field day to day in the delivery of health services reached the same conclusions and have adopted the same positions on this matter. That the conclusions were independently arrived at is illustrated by the fact that the Brief of Respondent Blue Cross of Kansas City in Opposition to the Petition for Certiorari was mailed as shown by the certificate of service on December 17, 1980. The letter from Secretary Harris to Attorney General Civiletti is dated the same day.

Any alleged confusion with respect to the Department of Justice business conduct review letters is generated only by the refusal of the Department of Justice to follow the decision of the Courts and of Congress. There is no confusion except any created by the opinion expressed by the Department of Justice. Congress has expressed itself. All others concerned, including three Courts, have agreed with Congress. It is respectfully submitted that in the absence of a constitutional objection which has

not been raised yet, the Department of Justice and its policy are subject to the Congressional mandate and to the decisions of Courts of Appeal.

The petition should be denied.

Respectfully submitted,

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